

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
JEFFERSON RIVER BASIN (41G)
PRELIMINARY DECREE

CLAIMANT: BFR Family Limited Partnership LLLP

OBJECTORS: BFR Family Limited Partnership LLP; Kelly R.
Hall

CASE 41G-0071-R-2020
41G 197223-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

FINDINGS OF FACT

1. Claim 41G 197223-00 is an irrigation claim owned by BFR Family Limited Partnership LLLP (BFR). It was originally consolidated in Case 41G-0052-R-2020 but was reconsolidated at the claimant's request into Case 41G-0071-R-2020. Claim 41G 197223-00 received objections from BFR and from Kelly R. Hall.

2. After several extensions to the settlement deadline, the case was placed on a hearing track.

3. The parties filed a Stipulation on May 11, 2022, and the hearing track order deadlines were vacated.

4. The May 11, 2022 Stipulation indicates several modifications should be made to claim 41G 197223-00.

Claim 41G 197223-00 appeared in the decree as a filed right with a March 28, 1901 priority date. The Stipulation requests the priority date be reduced to December 31, 1910 and the type of historical right be changed to "use."

The parties agree in the stipulation that the volume of 1,200 AF should be removed from the claim and replaced with a standard information remark stating the total volume of the water right shall not exceed the amount put to historical and beneficial use. They also indicate that there is no storage associated with claim 41G 197223-00 and the reservoir record should be removed from the claim.

The source name should be modified from Wash Gulch to Reed Gulch.

The point of diversion should be modified from the SENE of Section 6, T2S, R2W to the W2NW of Section 5, T2S, R2W.

The maximum acres should be reduced from 195 acres to 52 acres. The place of use should be changed from the S2NE and N2SE of Section 5 to the W2NW of Section 5 (and the place of use in Section 4 should be removed).

The means of diversion should be changed from Headgate to Dam/Natural Overflow.

5. There was no evidence, maps, or other supporting information submitted with the Stipulation to support or depict the requested modifications. As a preliminary

matter, the Master requested maps depicting the requested changes to source, point of diversion, and place of use.

6. On August 3, 2022, BFR filed Brief and Maps in Support of Stipulation (the Brief). In the Brief, BFR states that “Claim 41G 197223-00, as it appeared in the Preliminary Decree, claimed to be based upon a filed appropriation with a priority date of March 28, 1901.” The filed appropriation was filed by C.S. Shoemaker for water from Wash Gulch and was intended to serve an irrigation reservoir known as Dry Lake. BFR goes on to say, “that water right was not perfected as claimed.”

Included with the brief are several aerial photos pointing out the locations of the requested point of diversion, place of use, and source. The aerial photos are dated July 1, 1947, September 7, 1981, and August 11, 2011.

7. The Brief was interpreted, apparently in error, as acknowledgment that the C.S. Shoemaker appropriation was not the historical basis of the right. Regardless, the evidence provided with the Brief was not sufficient to overcome the prima facie status of claim 41G 197223-00. Specifically, it was not clear that Reed Gulch water had been used to irrigate the NW of Section 5, T2S, R2W since 1910. A deadline was set for the parties to provide additional evidence to support the terms of the May 11, 2022 Stipulation. The order setting filing deadline stated that if nothing was filed by the deadline, the stipulation would be rejected, and the case would be placed back on a hearing track.

8. On November 30, 2022, BFR filed Evidence in Support of Stipulation and Objection (Evidence Filing). The Evidence Filing clarifies that BFR still considers the C.S. Shoemaker appropriation the basis for claim 41G 197223-00, but that the original appropriation was either changed or perfected in a slightly different manner than originally contemplated.

9. BFR provides a thorough history of early appropriators Watt, Watt, and Shoemaker who began appropriating water rights in the 1890s to bring water to their landlocked properties. A central aspect of their water rights was Dry Lake, an offstream reservoir built by Watt, Watt, and Shoemaker. The early water rights were diverted through the Mason Ditch and/or Webb Hollow Creek and then diverted into Dry Lake. Later, Watt, Watt, and Shoemaker constructed the Adkins Ditch to allow for larger

diversions of water. The Adkins Ditch was constructed by about 1910. After the Adkins Ditch was completed, Watt, Watt & Shoemaker changed the points of diversion for all their previously appropriated rights to the Adkins Ditch.

10. BFR explains that because the March 28, 1901 notice of appropriation predates the construction of the Adkins Ditch, the diversion from Wash Gulch would have needed to go through the Mason Ditch and Webb Hollow Creek in order to reach Dry Lake.

11. Attached to the Evidence Filing is a copy of an agreement Shoemaker entered into with his neighbors that allowed Shoemaker the right to enter their ranch and construct, maintain, and conduct water through a ditch to reservoirs constructed by Shoemaker. The ranch consisted of the SE quarter of Section 6, T2S, R2W. BFR points out that the only creek running through the SE of Section 6, T2S, R2W is Reed Gulch.

Accordingly, it appears that by 1907, Shoemaker was diverting Wash Gulch water into Reed Gulch, and from Reed Gulch, into Webb Hollow Creek to Dry Lake.

12. BFR reports that the parties have not been able to locate any evidence concerning the historical use of this specific water right between 1907 and 1947. But by 1947 the aerial photo clearly shows irrigation occurring in the W2NW of Section 5, T2S, R2W (which is the place of use the parties identify in their Stipulation).

13. BFR explains that the requested priority date of December 31, 1910 was a compromise between the parties to resolve disputes concerning their respective interpretations of the available evidence.

14. The additional evidence, particularly the copy of the 1907 easement, and the thorough explanation provided by BFR in its Evidence Filing, adequately support the terms of the Stipulation. The evidence before the court overcomes the prima facie status of the claim by a preponderance of the evidence. Claim 41G 197223-00 should be modified as requested by the parties to reflect historical use.¹

15. Claim 41G 197223-00 received two DNRC issue remarks. The remarks are considered notice only issue remarks. One issue remark provides notice that a period of

¹ However, due to database restrictions, the means of diversion will be listed as “dam,” and an information remark will be added to the claim stating “water is also diverted by means of natural overflow.”

diversion was added to the claim; the other issue remark provides notice that the source name and reservoir were modified during DNRC review. The issue remarks do not overcome the prima facies status of the claim and should be removed from the claim.

16. BFR raised an objection to the order that set a filing deadline for the parties to file additional evidence in support of the Stipulation. Given that this Master's Report recommends the Stipulation be accepted by the Court, the objection is moot. However, if BFR believes otherwise, it may object to this Master's Report.

BFR asserts the court's order setting a filing deadline for additional evidence is contrary to Rule 17(c), W.R.Adj.R and unconstitutionally abridges BFR's due process and equal protection rights.

BFR characterized the changes requested to claim 41G 197223-00 as "reductions," which is not necessarily accurate. The Stipulation sought several substantive modifications to multiple elements of the claim, making this case factually distinct from the many cases cited in BFR's objection that allowed reductions to priority dates without further presentation of evidence. A claimant is not relieved of their burden of proof for amending elements of a claim by simultaneously requesting a reduction to the priority date.

Modifying elements of a claim through a stipulation is no different than modifying elements of a claim through a motion to amend. Parties seeking to amend their own water rights have the same burden of proof as an objector. *Nelson v. Brooks*, 2014 MT 120, ¶¶34, 375 Mont. 86, 329 P.3d 558. To meet that burden, a party must "prove by a preponderance of the evidence that the elements of the original claim 'do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.'" *Nelson*, ¶ 37 (quoting W.R.Adj.R. 19).

With the additional evidence provided in its Evidence Filing, BFR has met its burden.

CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be

contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

The evidence before the court supports the requested changes to claim 41G 197223-00 and overcomes the prima facie status of the claim by a preponderance of the evidence.

2. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. § 85-2-248(3), MCA.

The issue remarks appearing on claim 41G 197223-00 are notice-type issue remarks. The remarks have served their purpose of providing notice. The remarks do not overcome the prima facie status of the claim and should be removed.

3. The Water Court is not bound by settlement agreements. Settlement agreements are subject to review and approval of the Water Court. Rule 17, W.R.Adj.R.

The evidence provided in support of the stipulation supports the terms of the settlement agreement. The stipulation should be accepted by the Court.

RECOMMENDATIONS

1. Claim 41G 197223-00 should be modified as provided above.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm that the recommended modifications have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
JEFFERSON RIVER
BASIN 41G**

Water Right Number: 41G 197223-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: BFR FAMILY LIMITED PARTNERSHIP LLLP
PO BOX 456
ENNIS, MT 59729 0456

Priority Date: DECEMBER 31, 1910

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.50 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 52.00

Source Name: UNNAMED TRIBUTARY OF ANTELOPE CREEK

Source Type: SURFACE WATER
ALSO KNOWN AS REED GULCH

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		W2NW	5	2S	2W	MADISON

Period of Diversion: MARCH 1 TO NOVEMBER 1

Diversion Means: DAM

WATER IS ALSO DIVERTED BY MEANS OF NATURAL OVERFLOW.

Period of Use: MARCH 1 TO NOVEMBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	52.00		W2NW	5	2S	2W	MADISON
Total:	52.00						

BFR Family Limited Partnership
LLLP
Claim No. 41G-W-197223
Place of Use & Diversions
Aerial Photo 6150
Photo Date: September 9, 1954
Scale 1:12,000
Section 5, T2S R2W

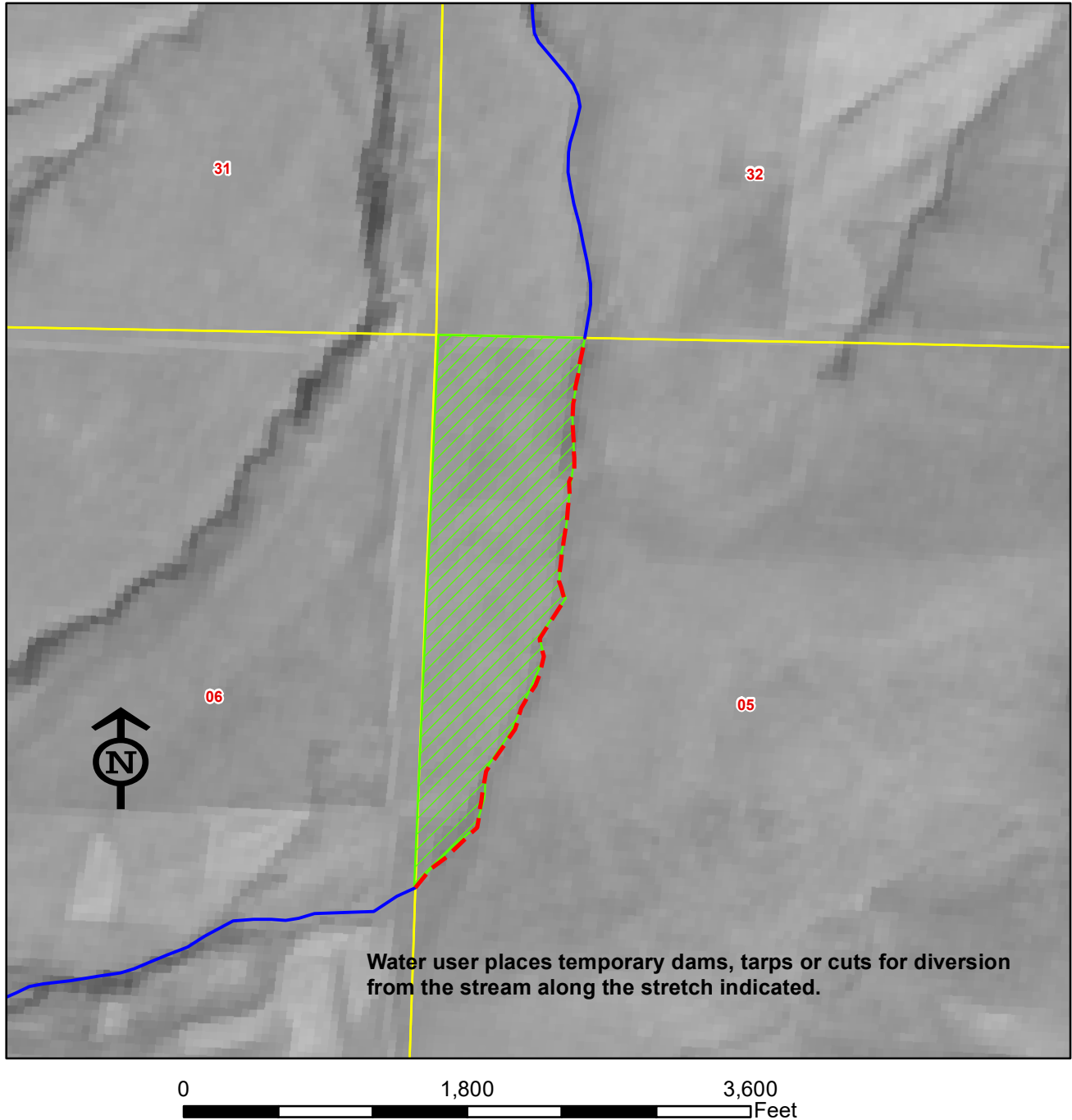


EXHIBIT
1

Legend

- Reed Gulch
- Diversions
- POU 197223